FILED
APR 8, 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-1476

In the Supreme Court of the United States

OCTOBER TERM, 1988

C. T. CARDEN, LEONARD L. LIMES, AND MAGEE DRILLING COMPANY,
Petitioners,

V.

ARKOMA ASSOCIATES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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This brief is respectfully submitted on behalf of respondent Arkoma Associates in opposition to the petition of C.T. Carden, Leonard L. Limes, and Magee Drilling Company for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.[1]

STATEMENT OF THE CASE

Respondent Arkoma Associates, an Arizona limited partnership, filed this action in the United States District Court for the Eastern District of Louisiana seeking a

[1] The decision of the Court of Appeals in *Arkoma Associates v. C.T. Carden, et al.*, No. 87-3624, is set forth in full as Appendix "A" to petitioners' petition.

money judgment in the amount of $560,000 against C.T. Carden and Leonard L. Limes as guarantors of an equipment lease between Arkoma Associates and Magee Drilling Company, an intervenor in this action. Contrary to the obtuse reference on page two of petitioners' petition, the lease was executed by Arkoma Associates through its general partners and not by the "various individuals comprising and in the name of respondent." To suggest, as petitioners do, that an amalgam of individuals are involved is to completely ignore the articles of limited partnership and the Uniform Limited Partnership Act under which Arkoma Associates was created.

Petitioners moved to dismiss Arkoma's action for lack of diversity jurisdiction. C.T. Carden and Leonard Limes are both citizens of Louisiana. Of the four general partners of Arkoma Associates, two are citizens of Arizona and two are citizens of Oklahoma. Of the forty-four limited partners of Arkoma Associates, only one is a citizen of Louisiana.

The district court denied petitioners' motion to dismiss, holding that diversity jurisdiction existed, but certified the issue for interlocutory appeal pursuant to 28 U.S.C. §1292(b). The Fifth Circuit Court of Appeals denied petitioners' petition for review of the district court's interlocutory order. Carden and Limes petitioned this Court for a writ of certiorari. That petition was also denied.

The district court then tried this case on the merits and granted judgment in favor of respondent. On appeal, the Fifth Circuit Court of Appeals affirmed the district court's judgment, rehearing was denied, and petitioners filed this application for certiorari.

REASONS FOR DENYING THE WRIT

1. The decision of the Fifth Circuit Court of Appeals in this action does not conflict with the decision of this Court in *Navarro Savings Association v. Lee*, 466 U.S. 458, 100 S.Ct. 1779, 64 L.Ed.2d 425 (1980). To the contrary, the decision of the Fifth Circuit Court of Appeals in this action is based on this Court's "real parties to the controversy" test enumerated in *Navarro*.

2. There is no conflict in the decision of the Fifth Circuit Court of Appeals and those of the Third, Fourth, and Seventh Circuit Courts of Appeals regarding the determination of diversity jurisdiction is cases in which a limited partnership is a party. The Third, Fourth, and Seventh Circuit Courts of Appeals have simply declined to follow the test this Court developed in *Navarro*.

ARGUMENT

1. THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS FOLLOWS THE REASONING SET FORTH IN THE DECISION OF THIS COURT IN *NAVARRO SAVINGS ASSOCIATION V. LEE*.

Simply stated, there is no reason for this Court to review the decision of the Fifth Circuit Court of Appeals. The Fifth Circuit's decision was based on its previous opinion in *Mesa Operating Limited Partnership v. Louisiana Intrastate Gas Corporation*, 797 F.2d 238 (5th Cir. 1986), which, itself, was squarely based on this Court's sound reasoning in *Navarro*.

In *Navarro*, this Court described the historical basis of diversity jurisdiction. As this Court stated:

> Federal courts have jurisdiction over controversies between "Citizens of different States" by virtue of 28 USC §1332(a)(1) . . . and U.S. Const, Art III, §2. Early in its history, this Court established that the "citizens" upon whose diversity a plaintiff grounds jurisdiction must be *real and substantial parties to the controversy*. . . . Thus, a federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of *real parties to the controversy*.

Navarro Savings Association v. Lee, 446 U.S. 458, 460-61, 100 S.C.t. 1779, 1781-82, 64 L.Ed.2d 425, 429 (1980) (citations omitted, emphasis added).

In *Navarro*, this Court had to decide whether to look to the citizenship of the beneficiaries of a business trust or to that of the trustees. Characterizing the business trust as "neither an association nor a corporation," although having some attributes of both, 446 U.S. at 462, 100 S.Ct. at 1782, 64 L.Ed.2d at 430, the Court held that the trust's resemblance to other forms of business enterprises was irrelevant to the determination of whose citizenship determined diversity jurisdiction. 446 U.S. at 465, 100 S.Ct. at 1784, 64 L.Ed.2d at 432. The Court opined that the test for diversity jurisdiction should focus on the "real parties to th[e] controversy." 446 U.S. at 462, 100 S.Ct. at 1782, 64 L.Ed.2d at 430. The Court defined these parties as those who have the power to "hold, manage, and dispose of assets for the benefit of others," and to control the litigation of same. 446 U.S. at 464-65, 100 S.Ct. at 1783-84, 64 L.Ed.2d at 431-32.

In this case, the Fifth Circuit Court of Appeals held that its recent opinion in *Mesa Operating Limited Partnership v. Louisiana Intrastate Gas Corporation*, 797 F.2d 238 (5th Cir. 1986), was dispositive of the jurisdictional issue.

In *Mesa*, the Fifth Circuit applied this Court's "real parties to the controversy" test in its decision to consider only the citizenship of the general partners. While acknowledging that the *Navarro* holding was limited to trusts, the Fifth Circuit, in *Mesa*, saw no reason not to apply this Court's reasoning in *Navarro* to a situation that it equally fits.

> The correct analogy to be drawn is not between the types of business enterprise involved, but between application of the Court's test in *Navarro* to another enterprise. The Court held the trustees the real parties to the controversy because they, and they alone among the membership, held title to the assets, managed the assets, and controlled any litigation involving the trust. Similarly, in the limited partnership here, the general partners, and they alone as against the limited partners, control and manage assets, conduct all business and control all litigation. In the absence of specific direction from the Supreme Court, we think the proper course is to apply the analysis made by the Court in *Navarro* to the facts before us.

Mesa Operating Limited Partnership, 797 F.2d at 242.

The Fifth Circuit, in *Mesa*, also pointed out that this Court, in *Navarro*, suggested that diversity jurisdiction should be a question capable of a simple and immediate answer. The Fifth Circuit stated:

> Where jurisdiction depends on citizenship of general partners and a showing that they have exclusive management and control of assets and litigation, determination of citizenship would be both faster and easier than a process of matching up long lists of members whose addresses may not even be correctly carried on the partnership's books as of the date of filing.

Id. at 243, n.2.

That simple and immediate answer can be obtained easily by application of this Court's "real parties to the controversy" test. Because the Fifth Circuit applied that test to a situation analogous to the facts in *Navarro*, it is clear that the Fifth Circuit's decision does not conflict with this Court's decision in *Navarro*, but follows it.

2. THE DECISIONS OF THE FIFTH CIRCUIT COURT OF APPEALS AND THOSE OF THE THIRD, FOURTH, AND SEVENTH CIRCUIT COURTS OF APPEALS REGARDING THE DETERMINATION OF DIVERSITY JURISDICTION IN CASES INVOLVING LIMITED PARTNERSHIPS ARE NOT IN CONFLICT.

Because the test to be applied in determining the citizenship of a *sui generis* organization for diversity jurisdiction has been set forth by this Court in *Navarro*, it is not necessary for this Court to hear this case. The fact that the other circuits have declined to apply the *Navarro* test to limited partnerships does not create a conflict within the circuits.

> The reasoning of the other circuits comes down to a disinclination to expand diversity jurisdiction without congressional authorization. . . . If determination of diversity jurisdiction rests on the test the Supreme Court developed in *Navarro*, diversity jurisdiction extends only to the precise parties to whom it should extend: that is, the real parties to the controversy. While this may arguably create diversity expansion, it is more semantics than principle. . . . Here we are dealing only with which already extant citizens are involved in the case; the issue here is merely a necessary interpretation of existing law.

Mesa Operating Limited Partnership, 797 F.2d at 241-42 (citations omitted).

Furthermore, there is no indication in the reasoning of those cases found in the other circuits that suggests that the outcome of those cases would be any different under an application of the *Navarro* test.

3. THE FIFTH CIRCUIT COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE GENERAL PARTNERS OF ARKOMA ASSOCIATES ARE THE REAL PARTIES TO THE CONTROVERSY.

As mentioned above, this Court, in *Navarro*, defined the "real parties to the controversy" as those with the power to own, manage, and control the assets of the entity and to control its litigation. Applying that definition, the Fifth Circuit, in *Mesa*, described the powers of both the general and limited partners.

> Mesa's Amended and Restated Agreement of Limited Partnership . . . provides that the general partners have full authority without limitation to conduct all business; expend or encumber all assets; negotiate, enter into, execute and perform all contracts and conveyances; and control all matters affecting rights and obligations of the partnership, "including the conduct of litigation." . . . In contrast, the limited partner is to take no part in operation, management or control of the partnership. . . . The limited partner cannot remove the general partners. . . . The limited partner can dissolve the partnership only after withdrawal of a general partner or an event which removes him. . . . The limited partner can amend the agreement only with consent of the general partners where such amendment has any legal effect on the general partners; the general partners

> may amend without agreement of the limited partner in a number of ways.

Id. at 242 (citations omitted).

Based on the foregoing, the Fifth Circuit concluded that the general partners of Mesa had exclusive power to manage and control all assets, conduct all business, and control all litigation; that the general partners were the real parties to the controversy; and, therefore, that only their citizenship was relevant to the determination of diversity jurisdiction. *Id.* at 243.

The Arkoma Associates Limited Partnership Agreement[2] clearly reflects that the general partners are vested with complete control of the management and operation of the partnership. Article 6.1 of the Limited Partnership Agreement provides:

> The General Partners shall manage and shall have exclusive and complete control of the operations of the Partnership and shall have power to do all things necessary or advisable to carry out the purposes of the Partnership.

Without limiting the generality of the foregoing statement, Article 6.1(a-m) of the Partnership Agreement sets forth specific powers granted to the general partners:

> (a) to expend Partnership funds in furtherance of the business of the Partnership and to acquire the Rigs and to execute, deliver and carry out the terms of the Lease on behalf of the Partnership;

[2] The complete text of the Arkoma Associates Limited Partnership Agreement is not reproduced here. It was a trial exhibit and included in the record on appeal to the Fifth Circuit Court of Appeals.

> (b) to lend money of the Partnership to affiliates of any of the General Partners; (c) to hold, improve, maintain, operate, finance, lease, sell, dispose of and otherwise deal with and invest in the Rigs; (d) to enter into joint ventures, farmouts, contract drilling or other arrangements involving the use of the Rigs with any person including affiliated parties; (e) to pay all debts and obligations of the Partnership; (f) to lend money to the Partnership and secure such indebtness by pledging assets of the Partnership; (g) to make such elections under the tax laws of the United States, the several states and other relevant jurisdictions as to the treatment of items of Partnership income, gain, loss, deduction and credit, and as to all other relevant matters, as it believes necessary or desirable; (h) to determine the terms of the offering of Limited Partnership interests, including the amount of discounts allowable, commissions to be paid and the manner of complying with applicable law; (i) to execute an agreement(s) with affiliated or unaffiliated persons or entities in connection with the offering and sale of Partnership interests; (j) to employ such agents, employees, independent contractors, attorneys and accountants as the General Partners deem reasonably necessary, including persons affiliated with the General Partners; (k) to effect necessary insurance for the proper protection of the Partnership and (1) of the General and Limited Partners, or (2) of either the General Partners or Limited Partners; (l) to pay, collect, compromise, arbitrate, or otherwise adjust any and all claims or demands of or against the Partnership; (m) to bind the Partnership in all transactions involving the Partnership's property or business affairs.

The Partnership Agreement also grants other powers to the general partners. In Article 3.4, the agree-

ment specifies that the partnership can borrow funds from the partners if the general partners determine, for any reason, that the business of the partnership requires additional capital. Article 4.4 of the agreement states that cash distributions are to be made quarterly or at more frequent intervals if the general partners so determine. Article 5.1 of the agreement states that the general partners have total discretion to select the method to calculate depreciation of any depreciable partnership assets. Article 5.2 of the agreement states that the general partners are responsible for preparing a report of the partnership's operations to be examined and reported upon by an independent certified public accountant.

Conversely, the limited partners have absolutely no management authority over the operations of the partnership. In fact, Article 7.1 provides:

> The Limited Partners shall not take any part in the control or management of or transact any business for the Partnership, nor shall the Limited Partners have power to sign for or to bind the Partnership.

The Partnership Agreement also restricts the limited partners' power and authority in other ways. Article 3.5 of the agreement states that no limited partner has the right to withdraw or reduce his contribution to the capital of the partnership unless the partnership is dissolved or as otherwise provided in the agreement. Article 10.1 of the agreement provides that each of the limited partners grants an irrevocable power of attorney to the general partners to draft and execute the necessary documents and modifications thereto to operate the partnership and to obtain loans on behalf of the partnership.

Based on the foregoing, it is clear that the four general partners, who are citizens of Arizona and Oklahoma, are the real parties to the controversy.

CONCLUSION

Petitioners have failed to show that the decision of the Fifth Circuit Court of Appeals is contrary to this Court's decision in *Navarro Savings Association v. Lee.* Also, petitioners have failed to show that the decision of the Fifth Circuit Court of Appeals is in conflict with the decisions of the Third, Fourth, and Seventh Circuit Courts of Appeals regarding the determination of diversity jurisdiction in cases involving limited partnerships. Finally, it is clear that the Fifth Circuit Court of Appeals correctly applied this Court's "real parties to the controversy" test when it considered only the citizenship of the general partners for purposes of diversity jurisdiction.

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,
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By: /s/ Mitchell J. Hoffman

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Dated: New Orleans, Louisiana
April 8th, 1989.

CERTIFICATE OF SERVICE

I hereby certify that three copies of Respondent's Brief in Opposition were served on all parties of record by depositing same in the United States mail, first-class postage prepaid and properly addressed to Richard K. Ingolia, Esq., Berke & Ingolia, 200 Oil & Gas Building, 1100 Tulane Avenue, New Orleans, Louisiana, 70112 this 8th day of April, 1989.

/s/ Mitchell J. Hoffman